Vernonia Charter

Preamble[1]

We, the people of Vernonia, Oregon, in order to avail ourselves of self-determination[2] in municipal affairs to the fullest extent now or hereafter possible under the constitutions and laws of the United States and the State of Oregon, through this charter confer upon the City[3] the following powers, subject it to the following restrictions, prescribe for it the following procedures and governmental structure, and repeal[4] all [5]previous charter provisions of the City.[6]

Chapter I

Names and Boundaries

Section 1. Title of Charter. This charter may be referred to as the 1998 Vernonia Charter.[7]

Section 2. Name of City. The municipality of the City of Vernonia, Columbia County, Oregon, shall continue to be a municipal corporation with the name "City of Vernonia".

Section 3. Boundaries.[8] The City includes all territory within its boundaries as they now exist or hereafter are modified pursuant to state law.[9] The custodian of the City's records shall keep an accurate, current description of the boundaries and make a copy of it available for public inspection in City Hall during regular City office hours.

Chapter II

Powers

Section 4. Powers of the City. The City shall have all powers which the constitutions, statutes, and common law of the United States and of this state now or hereafter expressly or impliedly grant[10] or allow[11] municipalities, as fully as though this charter specifically enumerated each of those powers.[12]

Section 5. Construction of Powers. In this charter, no specification of a power is exclusive or restricts authority that the City would have if the power were not specified.[13] The charter shall be liberally construed,[14] so that the City may exercise fully all its powers possible under this charter and under United States and Oregon law. All powers are continuing unless a specific grant of power clearly indicates the contrary.[15]

Section 6. Distribution of Powers. Except as this charter prescribes otherwise and as the Oregon Constitution reserves municipal legislative power to the voters of the City, all powers of the City are vested in the council.

Chapter III

Form of Government

Section 7. Council. The council consists of a mayor[16] and four[17] councilors nominated and elected from the City at large[18] or, in case of one or more vacancies in the council, the council members whose offices are not vacant.

Section 8. Councilors. The term of office of a councilor in office when this charter is adopted is the term of office for which the councilor has been elected before adoption of the charter (or is elected at the time of the adoption).[19] At each general election after the adoption, two councilors shall be elected, [20]each for a four-year term.[21]

Section 9. Mayor. The term of office of the mayor in office when this charter is adopted continues until the beginning of the first odd-numbered year after that time. At each subsequent general election, a mayor shall be elected for a two-year term.[22]

Section 10. Terms of Office. The term of office of an elective officer who is elected at a general election begins at the first council meeting of the year immediately after the election and continues until the successor to the office assumes the office.

Section 11. Appointive Offices. [23] A majority of the council [24]may:
(1) Create, abolish, and combine[25] appointive City offices, and,
(2) Except as the majority prescribes otherwise,[26] fill such offices by appointment and vacate[27] them by removal.

Chapter IV

Council

Section 12. Rules. The council shall prescribe rules to govern its meetings and proceedings.[28]

Section 13. Meetings. The council shall meet in the City regularly at least once a month at a time and place designated by council's rules, and may meet at other times in accordance with council rules.

Section 14. Quorum. A majority of the council constitutes a quorum for its business,[29] but a smaller number of the council may meet and compel attendance of absent councilors as prescribed by council rules.[30]

Section 15. Record of Proceedings. A record of council proceedings shall be kept and authenticated in a manner prescribed by council.[31]

Section 16. Mayor's Functions at Council Meetings.

(1) When present at council meetings the mayor shall:
  (a) Preside over deliberations of the council,
  (b) Preserve order,
  (c) Enforce council rules, and
  (d) Determine the order of business under the rules.
(2) Notwithstanding subsection (1) of this section, the mayor may temporarily cease to chair a council meeting and delegate the functions described in subsection (1) to another council member.
(3) The mayor is a voting member of the council.[32]

Section 17. Council President.

(1) At its first meeting after this charter takes effect and its first meeting of each odd-numbered year, the council shall appoint a president from its councilors.
(2) Except in voting on questions before the council,[33] the president shall function as mayor when the mayor is:
  (a) Absent from a council meeting, or
  (b) Unable to function as mayor.

Section 18. Vote Required. Except as sections 11, 14, 20 and 31 of this charter prescribe otherwise, the express[34] concurrence of a majority of the council members present and constituting a quorum is necessary to decide affirmatively a question before the council.[35]

Section 19. Vacancies: Occurrence. The office of a member of the council becomes vacant:

(1) Upon the incumbent's:
  (a) Death,
  (b) Adjudicated incompetence[36], or
  (c) Recall from the office;[37] or
(2) Upon declaration by the council of the vacancy in case of the incumbent's:
  (a) Failure, following election or appointment to the office, to qualify for the office within ten days after the time for term of office to begin,
  (b) Absence from the city for 30 days without the council's consent or from all meetings of the council within a 60 day[38] period,
  (c) Ceasing to reside in the City,
  (d) Ceasing to be a qualified elector under state law[39],
  (e) Conviction of a public offense punishable by loss of liberty[40], or
  (f) Resignation from the office.

Section 20. Vacancies: Filling. A vacancy in an elective office shall be filled by appointment by a majority of the council[41]. The appointee's term of office runs from appointment and until expiration of the term of the predecessor who has left the office vacant[42]. During a council member's disability to serve on the council or during a

member's absence from the City, a majority of the other council members may by appointment fill the vacancy pro tem.[43]

Chapter V

Powers and Duties of Officers

Section 21. Mayor. The mayor shall appoint:

(1) Members of committees established by council rules, and
(2) Other persons required by the council to be so appointed.[44]

Chapter VI

Personnel

Section 22. Qualifications.
(1) An elective city officer[45] shall be a qualified elector under the state constitution [46]and shall have resided in the City during the 12 [47]months immediately before being elected or appointed to the office. In this subsection "City" means area inside the City limits at the time of the election or appointment.[48]
(2) No person may be a candidate at a single election for more than one elective City Office. [49] .
(3) An elective officer may be employed in a City position that is substantially volunteer in nature.[50] Whether the position is so may be decided by the council.
(4) The council is the final judge of the election and qualifications of its members.[51]
(5) The qualifications of appointive officers of the City are whatever the council prescribes or authorizes.

Section 23. Compensation. The council shall prescribe the compensation of City officers.[52] The council may prescribe a plan for reimbursing city personnel for expenses that they incur in serving the City.

Section 24. Merit System. Subject to all collective bargaining agreements between the City and one or more groups of its employees, the council [53]shall prescribe rules governing recruitment, selection, promotion, transfer, demotion, suspension, layoff, and dismissal of City employees, all of which shall be based on merit and fitness.[54]

Section 25. Oath. Before assuming City office, an officer shall take an oath or shall affirm that he or she will faithfully perform the duties of the office and support the constitution and laws of the United States and of the State of Oregon.

Chapter VII

Elections

Section 26. Regulation of Elections. Except as this charter provides otherwise and as the council provides otherwise by ordinances relating to elections, the general laws of the State shall apply to the conduct of all City elections, recounts of the returns and contests.

Section 27. Tie Votes. In the event of a tie vote for candidates for an elective office, the successful candidate shall be determined by a public drawing of lots in a manner prescribed by council.

Section 28. Nominations. A person may be nominated in a manner prescribed by general ordinance[55] to run for an elective office of the City.

Section 29. Initiative and Referendum.

(1) Date of Election.

If an initiative or referendum petition contains the required number of verified signatures, a measure election shall be held at the next regular biennial election, unless an earlier election date is approved by the council.

(2) Effective Date of Measures.

A measure submitted to the electors shall take effect when approved by a majority of the electors voting upon it, unless the measure provides for another effective date. A measure shall have no effect while it is subject to a referendum.

(3) Conflicting Measures.

When there is conflict between measures approved by the electors at an election, the measure receiving the greater number of affirmative votes shall prevail.

(4) Charter Amendments.

Any measure to amend, repeal or replace the charter must receive at least 60 percent of the votes cast in order to be approved by the electors.

Chapter VIII

Ordinances[56]

Section 30. Ordaining Clause. The ordaining clause of an ordinance shall be "The City of Vernonia ordains as follows:".[57]

Section 31. Adoption by Council.[58]

(1) Except as subsection (2) of this section allows adoption at a single meeting and subsection (3) of this section allows reading by title only, an ordinance shall be fully and distinctly read in open council meeting on two different days

before being adopted by the council.

(2) Except as subsection (3) of this section allows reading by title only, the council may adopt an ordinance at a single meeting by the express unanimous votes of all council members present, provided the ordinance is read first in full and then by[59] title,

(3) A reading of an ordinance may be by title only if:

(a) No council member present at the reading requests that the ordinance be read in full or

(b) At least one week before the reading:

(i) A copy of the ordinance is provided for each council member,

(ii) Three copies of the ordinance are available for public inspection in the office of the custodian of city records,[60] and

(iii) Notice of their availability is given by written notice posted at the City Hall and two other public places in the City.

(4) An ordinance read by title only has no legal effect if it differs substantially from its terms as it was filed prior to the reading unless each section so differing is read fully and distinctly in open council meeting before the council adopts the ordinance.

(5) Upon the adoption of an ordinance, the ayes and nays of the council members shall be entered in the record of council proceedings.

(6) After adoption of an ordinance, the custodian of City records[61] shall endorse it with its date of adoption or on a later day the ordinance prescribes. An ordinance adopted to meet an emergency may take effect as soon as adopted.

Section 32. Effective Date. A nonemergency ordinance takes effect on the thirtieth day after its adoption or on a later day the ordinance prescribes.[62] An ordinance adopted to meet an emergency may take effect as soon as adopted[63]; as part of the ordinance the Council shall state the nature of the emergency.

Chapter IX

Public Improvements

Section 33. Procedure.

(1) The procedure for making, altering, vacating, or abandoning a public improvement shall be governed by general ordinance or, to the extent not so governed, by applicable general laws of the State.

(2) In this section "owner" means the record holder of legal title or, as to land being purchased under a land-sale contract that is recorded or verified in writing by the record holder of legal title, the purchaser.[64]

Section 34. Special Assessments. The procedure for fixing, levying, and collection special assessments against real property for public improvements or other public services shall be governed by general ordinance.[65]

Chapter X

Miscellaneous Provisions[66]

Section 35. Debt[67]. The City's indebtedness may not exceed debt limits imposed by state law.[68] A City officer or employee who creates or officially approves indebtedness in excess of this limitation is jointly and severally liable for the excess. A charter amendment is not required to authorize City indebtedness.

Section 36. Continuation of Ordinances. Insofar as consistent with this charter, and until amended or repealed, all ordinances in force when the charter takes effect retain the effect they have at that time.

Section 37. Repeal[69]. All charter provisions adopted before this charter takes effect are hereby repealed.[70]

Section 38. Severability. The terms of this charter are severable. If a part of the charter is held invalid, that invalidity does not affect another part of the charter, except as the logical relation between the two parts requires.

Section 39. Time of Effect. This charter takes effect January 1, 1998.[71]

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[1] A charter preamble is not legally necessary, and no previous version of this model has included one. A city charter is, however, a city constitution . Paulsen v. City of Portland, 149 U.S. 30, 38 (1893); 2 McQuillin, Municipal Corporations, sec. 903, 3d ed. Rev. (1979) ("municipal charters are sometimes mentioned as constitutions , that is, fundamental or organic laws of municipal corporations"). Constitutions traditionally have preambles (e.g., U.S. Constitution, Oregon Constitution). This preamble, like the federal and Oregon preambles, legislates and therefore makes unnecessary a separate enacting or ordaining clause. The preamble reinforces the general grant of powers in the charter, helps identify the charter as a municipal constitution, and indicates the basic philosophy of government that the charter reflects.

[2] This phrase regarding self-determination is based on the long-standing definition of home rule as broadly including "all forms of local or regional self-determination" (W. Munro, "Home Rule," 4 Encyclopedia of Social Sciences 434 (1932)).

[3] In this charter, the word "city" is used to the complete exclusion of the word "town." Although for some specific purposes Oregon law occasionally classifies municipalities (usually on the basis of population), no characteristic other than name generally distinguishes cities from towns. Oregon statutes occasionally use the word "town," usually in the alternative—e.g., "a city or town may..." (e.g., ORS 223.605 and 224.010)-

and some small cities have charters that call the municipalities "towns," but no legal obstacle prevents a "town" from renaming itself a "city." The change minimizes confusion about distinctions between towns and cities and furthers the trend for fewer and fewer Oregon municipalities to be called towns.

[4] This repealing phrase (i.e., all words that follow the final comma in this preamble) should be omitted from a charter for a city that has previously operated only under a general law such as the 1893 law on municipal incorporation (ORS 221.01-222.928) or the law 1941 on municipal incorporation (ORS 221.010-221.140, 221.410). Sometimes such a general law is referred to as the charter of a city operating under that law. Duncan v. Dryer, 71 Or. 548, 560; 143 P. 644 (1914). Usually, though, a charter is understood to be a legal document that constitutes the organic law of only one city. The repealing phrase uses the word "charter' in the usual sense. A city, moreover, cannot repeal a state statute by charter.

[5] It may be desirable, as explained below (see sec. 37, note 86), to retain certain terms of a previous charter when adopting a new one. If so, the word "all" in this repealing clause should be qualified.

[6] If the charter provides that it take effect on two different dates (see sec, 39, note 73 infra), the word "effect" should be qualified, probably by expanding the term to read "final effect."

[7] Insert the year in which the charter is adopted and the name of the city. The name prescribed for the charter is, in legislative parlance, a short title. It is not legally necessary for a charter to have a short title, but a title facilitates reference to it, including judicial reference by a court taking judicial notice of the charter under ORS 221.710 (1) and reference to the charter in a pleading under the same subsection.

[8] For several decades after Oregon assumed statehood, the boundaries of its cities were described specifically in special acts of the state legislature that incorporated cities or annexed territory to them. Those acts constituted charters or amendments to charters. The usual mode of annexing territory to a city was amendment by the legislature of the section of the special act that prescribed the city's boundaries.

After one of the 1906 home rule amendments to the state constitution (Or. Const., art. XI, sec. 2 (1906)) prohibited the legislature from enacting or amending city charters, municipal annexation could take place only under general law. However, city charters continued to prescribe city boundaries specifically. Meanwhile, under general law, the procedure for municipal annexation has become increasingly varied, agencies that have voices in determining city boundaries have increased in number and variety, and annexations have become more frequent. It therefore has become increasingly inconvenient to set forth specific boundary description in charters.

Amendment of a city charter, including a boundary-change amendment, is accomplishable only by the voters of the city. Annexation can now be effected, however, by several methods that do not involve city elections. It has therefore become increasingly illogical for a city charter to prescribe city boundaries specifically. Legally, those boundaries must be certain, and practically, they must be readily ascertainable by the interested public and

by governmental personnel whom they affect. They can be made ascertainable most conveniently by a document or documents other than a city charter, as this section prescribes.

[9] Because municipal annexation inherently involves exercise of power outside a city—that is, extramural power (Schmidt v. City of Cornelius, 211 Or. 505, 517, 316 P.2d 511 (1957))—and because the home rule powers of a city and its voters are intramural only (e.g., Curtis v. Tillamook City, 88 Or. 443, 454-55, 171 P. 574, 172 P. 122 (1918))—annexation can take place only as authorized by state law. Cf. Flavel Land and Development Co. v. Leinenweber, 81 Or. 353, 355, 158 P. 945 (1916). The opposite of annexation (i.e., detachment or withdrawal of territory from a city) involves only intramural action and is therefore accomplishable solely by the city and its voters. Schmidt v. City of Cornelius, 211 Or. 505, 517, 518, 316 P.2d 511 (1957). City boundaries, however, have an intergovernmental impact. O. Etter, "Oregon's Law of City Boundaries," in Central Lane Planning Council, Local Boundaries: Two Position Papers (1969), 19, 34. The state legislature has prescribed procedures for municipal withdrawal (Or. Laws 1939, c. 349, invalidated by Schmidt, supra, at 529, and repealed by Or. Laws 1969, c. 49, sec. 1; ORS 222.460 and 222.465, adopted in 1985).

[10] The municipal home rule amendments to the Oregon Constitution reserve certain powers to city voters (Or. Const., art. IV, sec. 1(5) (1968); art. XI, sec. 2 (1906, 1910). The Oregon Supreme Court has said that the amendments constitute a "continuous offer" of "all powers properly belonging to municipal government" (Robertson v. City of Portland, 77Or. 121, 127, 149 P. 545 (1915)). The offer is conditional; the voters of a city meet the condition (accept the offer) by adopting appropriate charter terms. The general grant of power in this section accepts the offer comprehensively. Many Oregon statutes grant powers to cities, as do some federal statutes. Occasionally, a statute says that a city may take certain action if its charter authorizes it to do so. The voters of the city may in that case meet the condition by adopting appropriate charter terms. The general grant in this section is intended to meet that condition.

[11] The U.S. Constitution does not mention local government, but it allows cities a wide range of action. The Oregon Constitution, while imposing some restrictions on local government, also allows cities a wide range of action. Federal and state statutes impose many restriction and requirements on cities, but they also allow cities a wide range of action. "Allow" in this section is intended to emphasize that, even though a city cannot identify a statute as the basis for a power that the city exercises, it may exercise that power if the power "Properly belong[s] to municipal government" (supra note 12) and is permissible under federal and state law.

[12] An extended discussion of the legal basis for general grants of power such as this appears in Appendix A, infra.

[13] This sentence negates a traditional rule of construction expressed by the Latin maxim "Inclusio [expressio] unius est exclusio alterius" (the inclusion or expression of one is the exclusion of the other). This rule has been applied many times to lists of specific charter powers, with the result that many powers not listed have been held not available for municipal exercise.

[14] For more than a century, city charters usually have been subject to a rule of strict construction known as Dillon's Rule:

> It is general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation,--not simply convenient, but indispensable. Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied. (1 Dillon, Municipal Corporations, sec. 237 at 448-50, 5th ed. (1911), cited in Burt v. Blumenauer, 299 Or. 55, 59, 699 P. 2d 168 (1985).) [Emphasis in original.]

The requirement that the charter be liberally construed is intended to make Dillon's Rule inapplicable to this charter.

[15] A local governmental power sometimes is regarded as exhausted once it has been used. This sentence is intended to negate that construction unless it is clearly proper.

[16] Some city charters provide that the mayor is not a member of the council. This exclusion complicates the city governmental structure and tends to confuse the public. Therefore, this model charter recommends including the mayor in the council.

The mayor's membership in the council implies that, unless the charter provides to the contrary, the mayor votes on matters before the council the same as other council members. Section 16, infra, states explicitly that the mayor is a voting member of the council. If it is desired that the mayor not so vote, this section may say simply that the council consists of a specified number of councilors elected from the city at large.

If the mayor may vote on matters before the council only when necessary to break a tie in the votes of councilors, then an analogy in the government of the United States suggests that the mayor not be a member of the council. In the United States Senate, where the vice-president votes only in cases of ties among the votes of senators, the vice-president, although the presiding officer of the Senate, is not a member of the Senate.

[17] Numerous small Oregon cities have five-member councils. If the council is to have five members, the word "six" should be changed to "four". A large city may of course, want a larger council of nine members or more. If so, the word "six" should be changed accordingly.

[18] Most Oregon cities nominate and elect councilors at large. Some nominate and elect councilors by district of ward. The smaller the city, the more cogent seems the rationale for nomination and election at large. A third alternative is to nominate by district and elect at large.

If councilors are to be nominated or elected by district, then some person or agency must specify the boundaries of the districts. The simplest and most representative mode of doing so is by ordinance. To that end, this section may read:

> Section 7. Council. The council consists of mayor nominated and elected at large and four councilors nominated and elected by districts with boundaries fixed by ordinance.

If councilors are elected by district and the distribution of population in the city changes, it may be necessary to specify district boundaries to meet the requirement of equal representation implicit in the Equal Protection Clause of the U.S. Constitution. This section then may be supplemented by a sentence reading:

> Within three months after an official census or census estimate indicates that the boundaries deny equal protection of the laws, the council shall specify the boundaries so as to accord equal protection of the laws.

Charters that provide for electing councilors by district usually require that each councilor, to qualify for council office, reside in the district that the councilor represents and continue to reside there throughout the term of office for which the councilor is elected or appointed (e.g., Springfield Charter, art I, sec. 8 (1964)).

[19] This sentence is adapted for voting on the charter at a primary or special election, If the charter is voted on at a general election, the words "or is elected at the time of the adoption" may need to be added.

[20] The Oregon Constitution requires cities to "hold their...regular elections for their several elective officers at the same time that the...general biennial elections for state and county officers are held." (Or. Const., art. II, sec. 14a (1917).) In addition, ORS 254.056 in effect defines as "general" the election held on the first Tuesday after the first Monday in November of am even-numbered year. Officers of "subdivision of the state" are to be elected at that election (id.). Since city officials may not be elected at any other election, the term "biennial" need not be included n each reference to a general election.

[21] This section assumes that adoption of the charter would effect no change in the size of the council or in terms of office. The section is nonetheless a transitional section providing for transition of the government of the City prior to adoption of the charter to the government of the city after adoption of the charter.

If, for example, section 7 were to decrease the number of councilors, section 8 probably would need to terminate prematurely some or all councilors' terms of office. Such a termination is legally possible (3 McQuillin, Municipal Corporations, sec. 23.39, 3d ed. Rev. (1982). The section also could, without changing the size of the council, shorten or lengthen the terms of office of incumbent councilors (id.).

Little or nothing in a proposed charter is more crucial for adoption of the charter or for its adequacy after adoption than its transitional terms. Problems of transition so vary that it is quite impossible, without going to inordinate length, to detail here all transitional contingencies that may have to be faced in particular cities at particular times. Charter committees and drafters must maintain a sharp eye for transitional features of a proposed charter and determine with extraordinary care how transition to government under a new

charter is to be effected. The Bureau of Governmental Research and Service can provide advise and assistance to cities attempting to draft appropriate language.

[22] A two-year term of office for the mayor and four-year staggered terms of office for an even number of councilors afford the voters an opportunity at each general election to vote on candidates for a majority of the council seats.

If a four-year term of office is preferred for the mayor, the second sentence of this section needs to be changed accordingly, and it may be necessary in the first sentence to change "first" to "second."

Sometimes the mayor is appointed from the council by the members of the council. ORS 221.130(1-3). If that feature of governmental structure is to continue under this charter, then the second sentence of section 9 needs to be replaced by a sentence reading:

> At the first meeting of the council in each odd-numbered year, the council shall appoint one of its members to serve as mayor for a term of two years.

If the mayor is appointed from the council, the council should have an odd number of members, and section 7 should be changed accordingly.

If the term of office of the mayor who is in office when the charter is adopted is terminated prematurely by this section (e.g., if the city is changing a four-year term to a two-year term), then a political expedient for winning approval of the charter may be language that would leave the term of office the same whether the charter is adopted or rejected. Section 9 may read, for example:

> The term of office of the mayor in office when this charter is adopted continues through 19__. At the general election that year, and at each subsequent such election, a mayor shall be elected for a two-year term.

Section 9 assumes that the charter is adopted at a primary election or at a special election a sufficient time before the next general election for a mayor to be elected at that election, If the charter is not so adopted, terms may be necessary in this section or elsewhere for electing the first mayor under the charter at a special election.

[23] If the city is to have council-manager government, and the voters are to be guaranteed that it does, the office of city manager needs to be named here. The city manager is always an appointive officer.

If the charter provides specifically for a city manager, this section should read:

> A majority of the council shall appoint and may remove a city manager. The majority may:
>
> (1) Create, abolish, and combine additional appointive offices and

(2) Except as the majority prescribes otherwise, fill such offices by appointment and vacate them by removal.

If the city manager is not so mentioned, the council may still establish a establish a manager plan of government by ordinance, but the voters have no guarantee that the plan will continue indefinitely, because the council may repeal the ordinance.

If the city is to have a city attorney, it is optional whether that officer be specified here. To specify the office in the charter would establish the office irrespective of the preferences of the council (and the chief administrator, if the city has one). Omission of reference to the city attorney would still leave open the option of having an appointive city attorney and the option of the council or some officer appointing the city attorney. In council-manager government, the city manager usually appoints the city attorney, but sometimes the council does so.

This section does not apply to appointive personnel of the city who are not officers. For differentiating "officers" from "employees":

> [C]ourts have stated certain tests and distinctions, such as that a municipal office is created only be legislation..., while the relation of an employee to a municipal corporation is based solely on contract; that an officer is generally required to take an oath of office..., while an agent or employee is not required to do so; that an officer performs public functions delegated to him as part of the sovereign power of the state..., while no share of the sovereign powers or functions of the government is vested in an employee; that official trust or responsibility is imposed by law on an officer..., but not on an employee; that the law prescribes and imposes the duties of an officer..., but not those of an employee; that an officer is charged with fixed, public duties..., while the duties of an employee are of a nongovernmental nature, and are neither certain nor permanent; that an officer is sometimes vested with a certain measure of discretion..., whereas the duties of an employee are purely ministerial; and that an officer is empowered to act in the discharge of a duty or legal authority in official life whereas an employee does not discharge independent duties, but acts by the direction of others. [62 Corpus Juris Secundum 895-96 (1949)]

Nevertheless, it is sometimes "difficult to determine whether a person is an officer or merely an agent or employee of a municipality, and it is even more difficult to lay down any fixed rule by which the question may be determined in all cases" (id. At 895).

Doubt as to whether a particular city appointee is an officer or an employee usually can be resolved, certainly so far as the city's law is concerned, by an ordinance indicating whether the appointee is an officer. Whether such a municipal characterization would affect application of state law to the city is not clear.

[24] Under section 7, supra, the majority must be of the membership of the council at the time of the action authorized by this section. If the membership is temporarily diminished by one or more unfilled vacancies, the majority is of the temporarily diminished membership. However, action by a mere majority of a quorum (e.g., three votes when a quorum of four is present) would not suffice to take action under this section. See note 31, infra.

[25] Offices that are inherently incompatible with each other should not be combined. A city attorney who has prosecutorial functions should not, for example, be made municipal judge of the city for which the attorney is prosecutor.

Note that this section relates only to city offices. If the city has a council-manager form of government, section 21a (6)(g) vests in the city manager the power to combine city positions and to otherwise reorganize them.

[26] If the city has the council-manager form of government, and this section provides for appointive officers other than the manager (such as the city attorney), the council could use the option provided it by this exception to delegate to the city manager the power to appoint such officers.

[27] In a strict legal sense this provision for removal is unnecessary, because in local government law the power to appoint an officer includes power to remove the officer. Venable v. Police Commissioners, 40 Or. 458, 463, 67 P. 203 (1902); 4 McQuillin, Municipal Corporations, sec. 12.249, 3d ed. Rev. (1985). However, this provision for removal clarifies the power of removal.

[28] Because council meetings are public meetings within the meaning of the state public meetings are governed by that law. ORS 192.610-192.710.

[29] The majority prescribed here is a number more than half the number of council members at whatever time determination of the existence of a quorum is needed. For a seven-member council, for example, a quorum is four or more. If the council has one unfilled vacancy, the quorum is the same. If, however, the council has two unfilled vacancies, the quorum is three, as is normal for a five-member council. If, through resignations or other contingencies, occupied council positions are reduced to two or one, the quorum is two or one, respectively.

[30] For example, the rules may prescribe that a police officer of the city, upon order by the council members present, find and bring to the meeting the absent member, or that the absent member be penalized in a specified manner.

[31] This section may be unnecessary in view of ORS 192.650, which requires keeping written minutes of public meetings. Nevertheless, the section may be included, so that its requirement would remain effective if the statute were repealed or amended to do away with the requirement for written minutes. The section does not require a written record; it allows the council to provide for an electronic record. The council may want both types of record.

[32] Some charters permit the mayor to vote only to break a tie. If the mayor's vote is to be so limited, this subsection should be modified accordingly.

See also the discussion of the mayor's membership in the council in section 7, supra note 18.

[33] Under this or similar charter provisions without this exception, the question has occasionally arisen whether the council president has two votes on a question before the council—one as mayor and one as presiding councilor when acting as mayor. The exception is intended to prevent such dual voting.

[34] The word "express" is included here to clarify the effect f abstention from voting. There appears to be a widespread belief that such an abstention is, in effect, a negative vote. At common law, however, abstention from voting was regarded as concurrence with the decision made by the votes cast. 4 McQullin, Municipal Corporations, sec 13.32, 3d ed. Rev. (1985). If the majority of those votes decided an issue affirmatively, the abstention thus became an affirmative concurrence; if the majority decided the issue negatively, the abstention became a negative concurrence. The word "express" in this section is intended to clarify that an abstention from voting on a question before the council cannot contribute to answering the question affirmatively and therefore is, more or less, a no vote. The word "express" guarantees that no vote less than a majority of a quorum can decide affirmatively a question before

[35] Under the main clause in this section, the council may act affirmatively through fewer than a majority of its members. A seven-member council may so act through three members, its quorum being four; a five-member council may so act through two members, its quorum being three. However, a question may be decided negatively by fewer members than would be required to decide it affirmatively. This can happen, for example, upon a 2 to 2 vote when four members constitute a quorum and one member present abstains.

The section is based on the assumption that it is not necessary to require every council member to vote on every issue that comes before the council while the member is present. The charter may, of course, make voting compulsory in every such situation. If abstention from voting is regarded as generally inadvisable, even though legally permissible, its incidence probably can be minimized by charter requirement that the abstainer explain the abstention when it takes place.

[36] "Adjudicated incompetence" means inability or unfitness to manage one's affairs because of mental condition formally determined in a legal proceeding by a court of competent jurisdiction.

[37] Recall of elective officers is governed by Or. Const., art. II, sec. 18, and ORS 249.865-249.880.

[38] The third revision of this model specified a 60-day period.

[39] Section 23, infra, specifies that qualifications of members of the council are residence in the city and status as a qualified voter. Under subsections (2)(c)and (2)(d)of this section, moving outside city limits or allowing voter registration to lapse would permit the council to declare a member's office vacant.

[40] This subsection formerly read "conviction of a felony [or] other offense pertaining to his office." If the new version of the subsection is regarded as too broad, the adjective "public" may be changed to "federal or state." Note that the offense referred to is

"punishable, " not punished, by loss of liberty. The term "loss of liberty" is used here because of increasing prevalence of the judicial attitude that an offense punishable by loss of liberty is criminal under the state constitution even though the offense is given some other name legislatively.

[41] Normally a single vacancy is filled at one time. The requirement of this section is sufficiently flexible, however, to allow the council's membership to be completed by appointment in a situation of simultaneous multiple vacancies so long as a single member of the council remains.

[42] Normally a vacancy in the council is left by an elected member. This provision is sufficiently broad, however, to cover appointment to fill a vacancy left by an appointee to the council.

This sentence allows the appointee's term of office to run more than two years in some situations. If that result is unacceptable, the sentence may be qualified by adding the following exception:

> [I]f the vacancy is filled more than ninety days before the next general election, the appointee's term of office runs only until the first council meeting in the year immediately following the election, and at the election a member shall be elected to the council for a two-year term.

[43] A disability under this provision is usually temporary. If the disability is permanent, it usually leads to resignation by the disabled member. If a permanently disabled member does not resign, the member's council office does not become vacant because of the disability. However, the other council members may make an appointment pro en to alleviate the disability, and the appointment may continue until a successor to the disabled member is elected to succeed the member. Permanent disability, moreover, normally leads to an absence under section 19, supra. If these methods of dealing with permanent disability are not sufficient, such disability may be added to the list of causes of vacancies under section 19, supra.

Whether a council member's condition amounts to disability under this section is a question of fact answerable by the member alone or in consultation with others. A dispute about the question can be resolved by appropriate judicial proceedings or, if the charter so provides, by the council. The power of the council under section 23(4), infra, to judge the qualifications of its members does not imply that the question of disability is ultimately one for the council to answer, because "qualifications" in that subsection means legal, not physical or psychological, qualifications. Consistently with that subsection, however, this sentence regarding disability may be expanded to make the council the judge of disability of its members and to authorize the council to declare a council office vacant in the event of permanent disability of its incumbent.

[44] Section 20 of the 1967 edition of this model includes, as additional duties of the mayor, the requirement to sign all ordinances and other records of council proceedings and to endorse fidelity and performance bonds. Omission here of those requirements is intended

to allow the council to ascertain the need for, and to prescribe the mode of, authenticating ordinances and other documents.

[45] An elective officer is normally elected by popular vote. The officer, however, may be an appointee to fill a vacancy in an elective office.

[46] Under Or. Const., art. II, sec. 2 (1974), a person is a qualified elector if (1) a citizen of the United States, (2) at least 18 years of age, (3) a resident of the State for six months immediately before voting, and (4) registered under state law to vote.

[47] It would be risky to fill this blank with a number more than "12." Recent years have seen many challenges to requirements of prior residence for holding public offices. Such requirements for more than a year have been invalidated to such an extent that "12" or fewer appears to be the advisable number here. See Bureau of Governmental Research and Service, University of Oregon, Are Candidate Residency Requirements Valid?, Blue Sheet No. 52 (February 1975).

[48] This definition accords with the generally accepted judicial rule that residence in annexed territory is equivalent to residence in the annexing territory. Gibson v. Wood, 105 Ky. 740, 49 S.W. 768, 43 L.R.A. 699 (1899) See also Meffert v. Brown, 132 Ky. 201, 116 S.W. 779 (1909); 3 McQuillin, Municipal Corporations, sec. 12.59, 3d ed. rev. (1982).

[49] Recent instances of dual candidacy by one person at a single election suggest an increasing need for this prohibition.

[50] This prohibition states in a somewhat qualified manner the general rule against holding incompatible offices (i.e., against holding simultaneously two offices, one of which is subordinate to the other). State v. Hoyt, 2 Or. 246(1867); 3 McQuillin, Municipal Corporation, sec. 12.67, 3d ed. rev. (1982). The prohibition bars a full-time employee, and in most cases a part-time employee, from serving as mayor or councilor. However, it does permit the mayor or a councilor to serve as a volunteer firefighter and to receive the nominal compensation usually provided for such service.

The prohibition is intended to prevent certain conflicts of interest in city service. Recent years have seen much legislation and litigation regarding conflicts of interest on the part of public officers, partly because strict adherence to rules against conflict of interest have posed special problems in some small cities and partly because certain city officers have increasingly become involved in quasi-judicial proceedings where the rules have taken on new rigor.

[51] Regarding the council's role in judging the qualifications of its own members, see Simon v. Portland Common Council, 9 Or. 437 (1881); State ex rel. Heath v. Kraft, 18 Or 550, 23 P. 663 (1890); Livesley v. Landon, 69 Or. 275, 138 P. 853 (1914).

[52] Compensation for personnel other than officers is fixed by the city's compensation plan, by collective bargaining, or by both. In either case, council approval is given as part of the budget procedure. ORS 294.352 (5) requires the annual budget to include salaries as items of estimated expenditure.

[53] If the city has a city manager or other chief administrative officer, the title of that officer may be substituted for the word "council" and the phrase "council approval and to" may be inserted after the words "subject to" at the beginning of the section.

[54] "Merit and fitness" indicate a general concept that allows wide discretion in interpretation and in application of the concept to specific personnel policies and practices.

Certain practices of merit and fitness are required by state and federal laws: for example, ORS 659.030 prohibits discrimination on grounds of "race, religion, color, sex, national origin, marital status or age" in certain situations; and the Federal Intergovernmental Personnel Act of 1970 requires that state and local governments in some grant programs practice certain merit principles (42 USC 4701 et seq.). Those principles may afford guidance for a city that prefers to incorporate terms more specific than "merit and fitness" in this section of the charter. The Act's principles, as augmented by implementing regulations, are:

(a) Recruiting, selecting, and advancing employees on the basis of their reactive ability, knowledge, and skills, including open consideration of qualified applicants for initial appointment;

(b) Providing equitable and adequate compensation;

(c) Training employees as needed, to assure high quality performance;

(d) Retaining employees on the basis of adequacy of performance, correcting inadequate performance, and separating employees whose inadequate performance cannot be corrected;

(e) Assuring fair treatment of applicants and employees without regard to political affiliation, race, color, national origin,, sex, religion, age, or handicap and with proper regard for their privacy and constitutional rights;

(f) Complying with federal equal-employment-opportunity and nondiscrimination laws, and

(g) Assuring that employees are protected against coercion for partisan political purposes and are prohibited from using their official authority to interfere with or affect elections and nominations for office.

[55] No feature of the total process of electing public officers is more important than the method of nominating candidates to run for office. Previous editions of this charter prescribed a rather detailed nomination procedure. It now appears that political preferences regarding nominations vary so much from time to time and city to city that it is advisable to allow flexibility in the nominating process. Yet, because that process needs to have a certain stability, the requirement that the process be governed by general ordinance is included here.

[56] The choice among forms of action (ordinances, resolutions, orders or mere motions) is a matter for council decision unless some statutory or charter provision requires a particular form of action in a specific circumstance. The most indisputably proper

function of an ordinance is to legislate—i.e., to prescribe "general, uniform and permanent rules of conduct, relating to the corporate affairs of the municipality" (5 McQuillin, Municipal Corporations, sec. 15.01, 3d. rev. (1969)). Yet, some cities use ordinances to express administrative directives, make quasi-judicial decisions, or take other nonlegislative action. Conversely, some cities use resolutions to legislate.

The significance of the choice of form of action is partly that city charters prescribe a more rigorous procedure for adoption of ordinances than for adoption of resolutions, orders and motions. The choice of form of action, moreover, may clarify whether a particular action is subject to the referendum. See Or. Const., art. IV, sec. 1(5) (1968); Long v. City of Portland, 53 Or. 92, 98 P. 149, 98 P. 1111 (1908). Confusion about the function of ordinances, about council procedure, and about application of the referendum can be minimized by using only ordinances to legislate and by using other forms to express nonlegislative council action.

Regardless of the form used, however, if the distinction is important, the courts will examine the substance or content of the action to determine whether the action is legislative or nonlegislative. In holding that an ordinance calling a special election was actually nonlegislative resolution and not subject to the referendum, the Oregon court stated: "The form in which the act is expressed is immaterial; the act done donates its character." Campbell v. City of Eugene, 116 Or. 264, 281, 240 P. 418 (1925), quoting from State v. Gates, 190 Mo. 540, 89 S.W. 881 (1905).

[57] An alternative ordaining clause would read:

> Section 30. Ordaining Clauses.
>
> The ordaining clause of an ordinance shall read:
>
> (1) In case of adoption by the council alone, "The council of the City of Vernonia ordains as follows:
>
> (2) In case of adoption or ratification by the voters of the city, "The people of the City of Vernonia ordain as follows:".

This specification of two different ordaining clauses implies that an ordinance adopted first by the council and then by the voters has both the first and the second ordaining clauses. An ordinance proposed by initiative petition has only the second clause. An ordinance adopted by only the council has only the first.

[58] This section does not apply to ordinances that voters of the city propose and adopt by the initiative.

[59] Because of section 14, supra, the number of "members present" must constitute a quorum. See supra note 37, regarding the requirement for "express" votes.

[60] The charter or the council may name this custodian. If the charter does, the custodian's title should be stated here.

[61] See supra note 74.

[62] Legislation cannot take effect so long as it is subject to the referendum. Or. Const. art. IV, sec. 1(3)(a), art. IV, sec. 28; Sears v. Multnomah County, 49 Or. 42, 88 P. 522

(1907); Long v. City of Portland, 53 Or. 92, 98 P. 324, 98 P. 1111 (1909). City legislation adopted to meet an emergency is not subject to the referendum and therefore may take effect immediately. See Or. Const., art. IV, sec. 1(5). The prohibition of emergency clauses on state and county tax laws apparently does not apply to cities. Cf. Or. Const., art. IX, sec. La, and Multnomah County v. Mittleman, 275 Or. 545, 552 P.2d 242 (1976), with 38 Or.Op. Att'y Gen. 387, 403 (1976), and 42 Or. Op. Att'y Gen. 277, 282 (1982).

A legislative declaration of an emergency to which legislation is addressed is not subject to judicial challenge "legislative findings on the necessity for emergency acts are conclusive on the courts." This rule applies to municipal legislation. Greenberg v. Lee, 196 Or. 156, 248 P.2d 324 (1952).

The statutory requirement in ORS 221.310 that an emergency measure be approved by three-fourths of the council and by the mayor applies only to a city that does not prescribe a contrary rule. Sections 30 and 31 permit adoption of ordinances by the council (i.e., a majority of a quorum), and there is no exception for emergency ordinances. These sections thus constitute a "conflicting provision" for the purpose of ORS 221.310.

[63] Oregon statutory law prescribes few such procedures for cities. Examples of statutory public-improvement procedures appear in ORS 223.805-223.871, dealing with parking facilities, and ORS 217.080-271.230, dealing with vacation of certain public property.

[64] Because the term "owner" has various legal meanings, this definition includes the traditional vendor and the traditional purchaser in a land-sale contract.

[65] Numerous state statutes apply generally to special assessments by cities for municipal improvements that specially benefit real property. Doubt as to applicability of any of the statutes under this section can be resolved by a general ordinance explicitly making the statue applicable.

[66] Earlier editions of this charter have included in this chapter a limitation on municipal tort liability. The limitation is now outmoded in view of developments during the last twenty years in case and statutory law on municipal tort liability, particularly ORS 30.260-30.300, which authorizes, within certain limits, "tort actions against public bodies." ORS 30.300 states that the statute "supersedes all home rule charter provisions and conflicting laws and ordinances on the same subject."

[67] Earlier editions of this charter have provided for specifying in monetary terms the limits on voluntary floating debt and bonded debt. Although debt in excess of either limit has been permissible with approval of the city's voters, the limit on voluntary floating debt has proved cumbersome on occasion. This section allows greater flexibility.

[68] State law generally limits the bonded debt of a city to "three percent of the true cash value of all taxable property" in the city "computed in accordance with ORS 308.207/" ORS 287.004 (2). The limitation does not apply "to bonds issued for water, sanitary or storm sewers, sewage disposal plants, hospitals, infirmaries, gas, power or lighting purposes, or...any off-street motor vehicle parking facility, nor to [so-called Bancroft] bonds issued pursuant to applications to pay assessments for improvements in installments." ORS 287.004(4). Bancroft bonds may not "exceed .03 of the latest true

cash valuation of the city." ORS 223.295 (1). "[W]arrants or short-term promissory notes" issued for certain purposes may "at no time exceed in the aggregate 80 percent of the ad valorem taxes upon real and personal property theretofore certified to the county assessor for levy...for the tax year in which the warrants or notes are issued, and 80 percent of other budgeted and unpledged revenues which the governing body...estimates will be received from other sources during said tax year." ORS 287.442 (2).

[69] If the City has previously operated only under general State law, this section is unnecessary. See supra note 4.

[70] It may be desirable to except certain prior charter provisions from the repeal: for example, provisions of legislative charters that confer extramural or intergovernmental powers that city voters may not assume merely by exercise of their home rule powers, provisions conferring certain jurisdiction on the municipal court.

[71] If, to accelerate transition to the system of government for which this charter provides, the charter calls for the first elective officers under the charter to be elected before the next general election after the charter is adopted, this section may read:

> Section 39. Times of Effect. Insofar as necessary for electing the first City officers under this charter, the charter takes effect _____, 199__. The charter takes full effect January 1, 1998.